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No. 93-453

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ROY ROMER, as Governor of the State of Colorado, GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

v.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

REPLY BRIEF OF PETITIONERS

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I. THE DECISION BELOW IS "FINAL" WITHIN THE MEANING OF 28 U.S.C. § 1257.

Respondents primarily argue that the Colorado Supreme Court's decision regarding the existence of a fundamental right of "any identifiable group" to be free from statewide regulation and the application of strict scrutiny to Amendment 2 is not "final" for purposes of 28 U.S.C. § 1257. To the contrary, the Colorado Supreme Court's decision is final because it completely resolved the federal issues which are the subject of the petition for certiorari, in a manner that as a practical matter all but assures

that Amendment 2 will be found unconstitutional and will never be enforceable.

As Respondents concede, "this Court may consider a state court decision to be final for purposes of [28 U.S.C. §] 1257 even though further proceedings are anticipated in the lower state courts." Opp. 7. This is so for state court decisions in which "the federal issue is conclusive or the outcome of further proceedings preordained" and thus "the case is for all practical purposes concluded." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 479 (1975); see *Mills* v. *Alabama*, 384 U.S. 214, 217-18 (1966); *Construction & Gen. Laborers' Local 438* v. *Curry*, 371 U.S. 542, 550-51 (1963); *Pope* v. *Atlantic Coast Line R.R.*, 345 U.S. 379, 382 (1953).

This characterization of finality applies precisely to the Colorado Supreme Court's decision resolving the federal issues that underlie the petition for certiorari. Respondents attempt to avoid this conclusion only by arguing that the state decision was an "interim ruling simply affirm[ing] an injunction that preserved the status quo pending a full trial on the merits of the plaintiffs' claims." Opp. 6. This is not so. Undertaking *de novo* review of the Fourteenth Amendment issues before it, see Pet. App. A-7 to A-8 ("the question we review is strictly a question of law" "subject to *de novo* review on appeal"), the Colorado Supreme Court finally resolved both that Amendment 2 implicates a fundamental right and that Amendment 2 is subject to "strict scrutiny" under the Equal Protection Clause, which is likely fatal. Pet. App. A-29 to A-31.

Respondents have, in fact, adopted precisely this position in proceedings on remand. They have argued—as they must—that the Colorado Supreme Court's decision conclusively establishes a fundamental right and that strict scrutiny applies to Amendment 2.[1]

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[1] Respondents observe that the State has not conceded in the trial court that it cannot prevail under the "compelling state in-

Especially for equal protection claims, a conclusion that strict scrutiny applies effectively concludes the underlying claim. "[S]trict scrutiny is strict in theory but usually fatal in fact." *Bernal* v. *Fainter*, 467 U.S. 216, 219 n.6 (1984) (internal quotation omitted); see Pet. 18. Respondents assert that *Burson* v. *Freeman*, 112 S. Ct. 1846 (1992), is contrary to this well-established proposition. It is not. *Burson* and the cases it cites establish that States have, for purposes of First Amendment analysis, certain compelling interests in regulating the voting process. But *Burson confirmed* that a finding that strict scrutiny applies in all but the exceptional case is a conclusive determination. This Court "readily acknowledge[d] that a law rarely survives such [strict] scrutiny" and "reaffirm[ed] that it is the rare case in which we have held that a law survives strict scrutiny." *Id.* at 1852, 1857.

The Colorado Supreme Court's decision is just as "final" as the order of an Illinois Appellate Court that this Court reviewed in *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971). In *Keefe*, this Court granted certiorari from an intermediate appellate court decision upholding a temporary injunction, and did so despite the certainty of further trial court proceedings. Review was appropriate because "nothing in the record . . . would indicate that the Illinois courts applied a less rigorous standard in issuing and sustaining th[e] injunction than they would with any permanent injunction in the case" and the state court's conclusion relied upon no "disputed question of fact." *Id.* at 418 n.*. In this case, the Colorado Supreme Court's holdings regarding the existence of a fundamental right and the applicability of strict scrutiny were purely legal determinations, and they

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terest" standard. That argument is disingenuous. The State's position on that issue was adopted only after the trial court insisted on holding a trial on the remaining issues—a course of action to which Petitioners strenuously objected.

would apply as well to review of a permanent injunction. To be sure, the holding is "law of the case" and will control all future proceedings unless the Colorado Supreme Court were to overrule itself, an unlikely event.

Indeed, *Keefe* presents a closer case than does this one. Justice Harlan dissented in *Keefe* because the Illinois *Supreme* Court had not yet passed upon the legal reasoning at issue and would, after remand, have an opportunity to review the intermediate court's legal determination. *Id.* at 421-22 (Harlan, J., dissenting). Here, of course, the Colorado Supreme Court has issued the State's final determination regarding the federal issue, and review may be had only in this Court.

Respondents urge the Court to deny certiorari to avoid "piecemeal" litigation of federal issues. Opp. 8. But the other grounds asserted by Respondents raise insubstantial constitutional issues: the Colorado Supreme Court acknowledged that Respondents' suspect class argument has been rejected by all courts (Pet. App. A-8 to A-9), and there is no serious doubt that Amendment 2 satisfies rational relationship review. Respondents also advert to vague First Amendment challenges that the state supreme court did not even address in entering the orders under review, and Respondents make no effort to demonstrate how those issues could possibly justify enjoining Amendment 2. In sum, the only federal issue that stands as an obstacle to the enforcement of Amendment 2 is the "fundamental rights" challenge upheld by the state supreme court. Thus, review of that decision now will permit the State's constitutional amendment to be implemented, and review now is the only way to permit that amendment to go into effect.

Moreover, Respondents attempt to distinguish *Keefe*, and to argue against review generally, on the ground that the Colorado Supreme Court's decision implicates no federal interest. Opp. 13-14. Again, that is not so. Respondents separately acknowledge that "self-government"

is "a core constitutional goal." Opp. 19. The Colorado Supreme Court's decision interferes with that federal constitutional interest directly as well as more broadly. "Self-government" of course includes passage and enforcement of measures such as Amendment 2. Cf. U.S. Const. amend. X. Failure to review the decision will have a significant chilling effect on the willingness of individuals and groups both within and without Colorado to undertake measures similar to Amendment 2. Those citizens will thereby lose their right to petition government either through the referendum process or by lobbying their legislatures. What makes the injury particularly acute is that cycles for pursuing such measures have finite cut-off dates that will soon pass. Thus, the injury cannot be remedied except by this Court granting review now and resolving the federal constitutional issue finally resolved by the Colorado Supreme Court in this case. This provides a particularly compelling reason for the Court to conclude that the order is "final" within the meaning of Section 1257.

II. THE "FUNDAMENTAL RIGHTS" HOLDING OF THE COURT BELOW WARRANTS REVIEW BY THIS COURT.

There is no merit to Respondents' half-hearted suggestion that this case fails to present a conflict with decisions of this and other courts or to present issues of exceptional importance meriting review. Indeed, Respondents City of Aspen and City Council of Aspen do not even offer these arguments.

A. Respondents argue that the Colorado Supreme Court's decision is consistent with the line of this Court's cases commencing with *Hunter* v. *Erickson*, 393 U.S. 385 (1969). This would be so only if the Court in those cases joined the Colorado Supreme Court in holding that the Equal Protection Clause protects "any identifiable group" from being subject to differential, statewide regulation. However, that claim is precisely the one that this

Court has already disavowed in *James* v. *Valtierra*, 402 U.S. 137 (1971), and *Washington* v. *Seattle School Dist. No. 1*, 458 U.S. 457 (1982).

In *James* v. *Valtierra*, this Court could not have been plainer in holding that *Hunter*'s equal protection holding was limited to measures that embodied "distinctions based on race." 402 U.S. at 141 (internal quotation omitted). Because the challenged measure before the Court involved no suspect class, "[t]he present case could be affirmed only by extending *Hunter*, and this we decline to do." *Id.* Any other result would produce an absurdly broad prohibition upon state measures designed to secure uniform regulation: "of course a law-making procedure that 'disadvantages' a particular group does not always deny equal protection," and the Equal Protection Clause could not be read to limit referenda that targeted particular groups "because they would always disadvantage some group." *Id.* at 142.

In *Washington* v. *Seattle School Dist. No. 1*, 458 U.S. 457 (1982), this Court reaffirmed that limitation upon *Hunter*. It held that "the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action," but it is only "when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decision-making process" that a different analysis is required. *Id.* at 470 (emphasis in original).

The conflict between this Court's decisions and the holding below is therefore plain. Indeed, it is hard to imagine how the issue could be framed any more clearly than it has been by the court below, and therefore certiorari is particularly justified.

B. Respondents also suggest that the Colorado Supreme Court's decision neither conflicts with the uniform decisions of the United States Courts of Appeals—which

hold that sexual orientation does not define a "suspect class" triggering strict scrutiny—nor establishes a wide-ranging principle that impedes uniform, statewide regulations. Opp. 23-25. Respondents' arguments are not only without merit, but are contradictory.

Respondents claim that the Colorado Supreme Court's decision has no wide-ranging effect because "the careful delineation of rights at issue" is limited to "the political participation of an independently identifiable group." Opp. 24-25. The state court decision is conceivably limited only if the "group" is "identifi[ed]" in precisely the manner required by suspect class analysis. Otherwise, any "independently identifiable group"—*e.g.*, doctors, farmers, persons with certain taxable income, or persons committing particular criminal acts—would all be able to benefit from the Colorado Supreme Court's decision by invoking the Equal Protection Clause to secure particular protections. Review is warranted because the Colorado Supreme Court has adopted a dangerously open-ended principle that threatens to impede enforcement of a wide variety of routine state constitutional provisions and legislation. See also Pet. 13-17.

If, in fact, "independently identifiable group[s]" are those that seek "the enactment of civil rights legislation" (Opp. 24 n.11), then Respondents have simply confirmed that the Colorado Supreme Court's protection of "gay men, lesbians, and bisexuals" (Opp. Question Presented) conflicts with decisions of federal courts of appeals. Respondents do not dispute that those federal courts have uniformly declined to extend "suspect class" or "strict scrutiny" protection based upon sexual orientation. See Pet. 11-13. Although the Colorado Supreme Court has not invoked the magic words of "suspect class," it has adopted indistinguishable reasoning and protections that accompany a finding that a measure is directed at a suspect class. Review by this Court is further warranted on this basis.

CONCLUSION

For the reasons stated herein and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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